IN THE SUPREME COURT OF MISSOURI

SC 94844

RUTH MICKELS, et al.,

Appellants-Plaintiffs,

v.

RAMAN DANRAD, M.D.,

Respondent-Defendant.

Appeal from the Circuit Court of the County of Marion, Missouri
Cause No. 12MR-CV00727
Judgment dated February 10, 2014
Honorable Rachel Bringer Shepherd

Transferred after Opinion from the Eastern District
Court of Appeals (ED 101147) by Order of this Court

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the Summary Judgment entered on February 10, 2014 by the Circuit Court of Marion County, Missouri. A1-2. Judgment was entered in favor of Defendant Raman Danrad, M.D. ("Respondent") on the claim of Plaintiffs Ruth Mickels, Joseph Mickels, Jr., Billy Joe Mickels, Jennifer Unglesbee and Brittany Mickels ("Appellants") for the wrongful death of Joseph Mickels, Sr. ("Mr. Mickels"). A1-2.

Jurisdiction is appropriate pursuant to Rule 83.04 in that, following an Opinion by the Court of Appeals, Eastern District, this Court sustained Appellants' application for transfer.

STATEMENT OF FACTS

A. Mr. Mickels's Pertinent Medical History and Death

On December 12, 2008, Respondent, a radiologist, reviewed an MRI study of Mr. Mickels's brain. LF0132. Respondent did not read the MRI as showing that Mr. Mickels had a brain tumor. LF0132.

On February 17, 2009, Respondent reviewed a CT study of Mr. Mickels's brain. LF0133. At that time, Respondent observed a brain tumor. LF0133.

That same day, following Respondent's diagnosis of a brain tumor, Mr. Mickels was seen by oncologists at the University of Missouri Medical Center. LF0119 (p.16). On February 20, 2009, Mr. Mickels underwent brain surgery to remove the tumors. LF0092 (p.25).

Following the surgery, it was determined that Mr. Mickels's cancer was an "anaplastic mixed glioma (astrocytoma oligodendroglioma)." LF0121 (pp.22-3). Mr. Mickels subsequently received various treatments, including radiation and chemotherapy. LF0124 (pp.35-7). On June 12, 2009, Mr. Mickels died. LF0090 (p.16).

B. Testimony of Dr. Carl Freter

Respondent deposed Mr. Mickels's treating oncologist, Dr. Carl Freter, whom Appellants had intended to call at trial. LF0115-31. At the time he treated Mr. Mickels, Dr. Freter was a Professor and the Director of the Division of Hematology and Oncology at the University of Missouri. LF0128 (p.50-1). He described the impact of the alleged delay in diagnosing the cancer to Mr. Mickels's death, to wit:

Q. If Mr. Mickels had a mass in his right temporal parietal lobe on December 12, 2008, when the defendant, Danrad, read the MRI of the plaintiff's brain on the same date, which was not noted by Dr. Danrad, what would Mr. Mickels' life expectancy have been at that time, if the aforesaid mass had, in fact, been noted, identified, and correctly treated?

…

A. In general, under these conditions with this tumor having been discovered earlier in this sort of hypothetical question I'm being asked, then it's my opinion that the patient would live a number of months longer.

…

Q. What's your best estimate or your best guess?

A. Okay. My best guesstimate is that it would be on the order probably in this case of on the average perhaps six months.

Q. Okay.

A. And I'm factoring in the issue that the tumor was found at a smaller stage, so the patient would likely have lived longer. The treatment would likely have been somewhat more effective. And that's true of all three treatments, actually: The surgery, the radiation therapy, and the chemotherapy. They all work better on smaller tumors and there's lots of data to support that, so there's that thing to -- there's that effect to factor in.

And -- and I think those are really the major things. And a smaller tumor also tends to be discovered at a time when it's destroyed less brain, obviously. And so the overall performance status, we call it, the ability of the patient to both do their activities of daily living as well as withstand the therapies that we give them is better when the tumor is small.

Q. Okay.

A. So we degrade their quality of life. We degrade the -- and the tumor has degraded the patient's quality of life less when the tumor is smaller. So there are lots of advantages to discovering the tumor when it's smaller rather than larger, when it was finally found.

But even taking all that into account, the tumor was incurable when it was found and it would've been incurable at the time it was -- at the time the original X-ray we're talking about, with respect to you (sic) defendant, even if it (sic) identified at that time, it would not have made an enormous difference. We're not talking about decades or years. We are talking about a matter of months and my guess is we're talking a matter of six months or so on the average under these circumstances.

Q. Okay. So if Mr. Mickels passed away in June of 2012, which I believe he did -- July?

MR. NEILL: '09.

MR. MORTHLAND: Oh, I'm sorry. In June of 2009.

THE WITNESS: Yes.

BY MR. MORTHLAND: Q. Then he maybe would've had six months longer.

A. Yes, on average. Now, he might've had a year. He might've had, you know, less than six months. It's hard to tell.

LF0123 (p.31-3). Dr. Freter further testified:

Q. ...Doctor, all of the opinions that you have given here today have been to a reasonable degree of medical certainty; is that correct?

A. Yes, sir.

Q. And they've all been based on your background, training, experiences, set forth in the CV that we've admitted as an exhibit; is that right?

A. That's correct.

Q. And one thing I did want to clarify. You had mentioned earlier that it was your opinion -- well, actually, I believe the phrase used was "it was your best guesstimate" that the hypothetical scenario [Respondent's counsel] had put forth would've meant that more likely than not Mr. Mickels would've lived six months longer than he actually did.

A. Yes.

Q. And I just want to make sure, when you're using the term "guesstimate," could you -- I mean, that's still your medical opinion.

A. Right.

Q. What you're saying is --

A. It's my medical opinion that it is more likely than not that if this had been discovered earlier, as has been alleged, then he would've lived an additional six months on the average.

LF0130 (p.60-1).

Dr. Freter also described how Mr. Mickels's course of treatment would have differed had the cancer been diagnosed in December of 2008, rather than February of 2009, to wit:

Q. …[A]ssuming [the tumors] were discovered and treated on or about December 12, 2008, would the treatment have been different than what was, in fact, carried out in February of 2009?

…

THE WITNESS: Oh, yes.

BY MR. MORTHLAND: Q. Okay. How so?

A. I mean, the -- well, first of all, the surgical resection would've been very different. The amount of brain you're talking about removing in –

earlier on is going to be much less than your resecting later on with a four-by-four-centimeter tumor that's got a necrotic center.

Q. Uh-huh.

A. I mean, this tumor's now so big that it's outstripping its own blood supply and dying in the center.

Q. Uh-huh.

A. And so it's kind of growing now as a rind on a spherical surface outward and destroying brain as it goes. Whereas earlier on it doesn't even have a necrotic center and so there's -- there's just not so much brain disrupted by this thing and there's not so much brain disrupted by the surgery.

Q. Would you still be doing chemotherapy and radiation though?

A. Yes.

Q. Okay. So the main -- not the main advantage, but less tissue would obviously have to be taken out because there's less part of the brain affected. But radiology -- or radiation oncology, chemotherapy, all that would occur as well.

A. Yes. The -- and with respect to the chemotherapy, that would've occurred in precisely the same way.

Q. Okay.

A. Same doses, same time frame, same everything. The radiation oncology would've occurred in a somewhat different fashion, or you could say slightly different fashion, in that there -- this would've been treated with whole brain radiation, but there would've been a -- what we call a cone down or an increased intensity treatment to a smaller area that, in the case of the smaller surgical procedure that we've been talking about, would've occasioned less radiation therapy.

Q. Uh-huh.

A. So there would've been less morbidity or less collateral damage done to the patient's brain in the case of discovering the tumor at a smaller size from both surgery and radiation therapy, but the chemotherapy would've been the same.

LF0124 (pp.35-7).

C. Procedural Posture

Appellants filed suit against Respondent asserting a single count for wrongful death.[1] LF0010-42. Respondent's Motion for Summary Judgment, LF0056-7, was granted by the trial court. A1-2. On appeal to the Eastern District, the Judgment was Affirmed. This Court subsequently sustained Appellants' application for transfer.

[1] Several counts originally asserted against other parties were voluntarily dismissed without prejudice by Appellants. LF0043, LF0048, LF0165.

POINT RELIED ON

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE SUMMARY JUDGMENT WAS IMPROPER IN THAT THE EVIDENCE ESTABLISHED THAT, OR CREATED A GENUINE ISSUE OF FACT WHETHER, RESPONDENT'S NEGLIGENCE CAUSED OR CONTRIBUTED TO CAUSE MR. MICKELS'S DEATH ON JUNE 12, 2009.

Strode v. St. Louis Transit Co., 95 S.W. 851 (Mo. 1906)

De Maet v. Fidelity Storage, Packing & Moving Co., 132 S.W. 732 (Mo. 1910)

Collins v. Hertenstein, 90 S.W.3d 87 (Mo.App. W.D. 2002)

Petro v. Town of West Warwick ex rel. Moore, 889 F.Supp.2d 292 (D.R.I. 2012)

ARGUMENT

This case turns on a single issue: Does a wrongful death claim exist where a tortfeasor's negligence contributes to cause a person to die at a particular time, even though there is evidence that he would have died at a later point in the absence of the negligence?

I. Standard of Review

The grant of Summary Judgment is reviewed *de novo*. *ITT Comm. Financial Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo.banc 1993).

Summary Judgment is authorized only where the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Ronollo v. Jacobs*, 775 S.W.2d 121, 125 (Mo. banc 1989), *citing* Rule 74.04(c). Summary Judgment is an extreme remedy which a trial court should not invoke without exercising great caution. *Bell v. Garcia*, 639 S.W.2d 185, 190 (Mo.App. E.D. 1982). Summary Judgment "borders on a denial of due process" because it deprives an individual of his "right to a day in court." *Wilson v. Simmons*, 103 S.W.3d 211, 220 (Mo.App. W.D. 2003). Summary Judgment is appropriate "only when no theory within the scope of the pleadings, depositions and affidavits filed would permit recovery." *Hammonds v. Jewish Hosp. of St. Louis*, 899 S.W.2d 527, 530 (Mo.App. E.D.1995).

The facts and all reasonable inferences must be viewed in favor of the non-moving party. *ITT*, 854 S.W.2d at 376; *Cook v. DeSoto Fuels, Inc.,* 169 S.W.3d 94, 101 (Mo.

App. E.D. 2005). This is particularly true here, where the testimony before the court was by way of Respondent's deposition of a non-retained treating physician who was planning to testify at trial. "[I]n determining a summary judgment motion, the judge ... is not to decide what the facts are or to make credibility determinations, but simply to determine whether there is a triable issue of fact." *Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 844 (Mo. banc 2005).

II. Appellants produced evidence of each element of a wrongful death, medical malpractice claim, such that Summary Judgment was not warranted.

Before the trial court, Appellants produced sufficient evidence to support a wrongful death, medical malpractice claim. In order to make a prima facie case for medical negligence, a plaintiff must establish three elements: (1) that an act or omission of the tortfeasor failed to meet the requisite medical standard of care; (2) that the act or omission of the tortfeasor was performed negligently; and (3) that there was a causal connection between the act or omission and the injury. *Wilson v. Lockwood*, 711 S.W.2d 545, 550 (Mo. App. 1986). In addition, Missouri's wrongful death statute states:

> Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages...

Mo.Rev.Stat. §537.080.

The first two elements are not at issue on appeal. Appellant produced evidence that, by failing to observe and report the presence of cancer shown on the MRI of December 12, 2008, Respondent failed to meet the standard of care and was negligent. LF0092 (p.22), LF0110 (p.94). Respondent's Motion did not challenge either of those elements, nor were those elements pertinent to the trial court's ruling. A1-2. Rather, Respondent challenged the element of causation.

Causation is determined by a "but for" test. *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 860 (Mo. 1993). The "but for" test provides causation if an injury would not have occurred "but for" the tortfeasor's conduct. *Id.*, at 861. A tortfeasor's conduct must directly cause or directly contribute to cause the plaintiff's injury. *Id.*, at 863. "To show causation in any wrongful death case, a plaintiff must show that the negligence of the defendant 'directly cause[d]' or 'directly contribute[d] to cause' the patient's death." *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 306 (Mo. 2011) (reversing summary judgment in favor of defendant in wrongful death, medical malpractice claim). *See also, Honey v. Barnes Hosp.*, 708 S.W.2d 686, 692-3 (Mo.App. E.D. 1986) (affirming modification of MAI 20.02 by MAI 19.01 in a medical malpractice, wrongful death case); MAI 19.01 (confirming applicability in death cases).

The facts are straightforward. On December 12, 2008, Respondent read an MRI of Mr. Mickels's brain as not showing cancer. LF0132. On February 17, 2009, Respondent read a CT study of Mr. Mickels's brain and observed a brain tumor. LF0133. On June 12, 2009, Mr. Mickels died. LF0090 (p.16).

Appellants presented evidence that, had the cancer been diagnosed in December of 2008 instead of February of 2009, Mr. Mickels would not have died on June 12, 2009. Dr. Freter, Mr. Mickels's treating oncologist, testified that if the tumor was diagnosed in December of 2008, "the patient would live a number of months longer." LF0123 (p. 31). When asked how much longer, Dr. Freter was clear: "It's my medical opinion that **it is more likely than not** that if this had been discovered earlier, as has been alleged, then **he would've lived an additional six months** on the average." LF0130 (p. 61)(emphasis added). Dr. Freter confirmed that his opinions were made to a reasonable degree of medical certainty. LF0130 (p. 60-1).

These facts and all reasonable inferences must be viewed in the light most favorable to Appellants. *ITT*, 854 S.W.2d at 376. A court cannot weigh the evidence or make credibility determinations, but only determine if there is an issue of fact. *Care and Treatment of Schottel*, 159 S.W.3d at 844. Here, Appellants produced evidence of each element of a medical malpractice, wrongful death claim. The evidence shows that Respondent failed to meet the standard of care, and was negligent, when he failed to observe and report the presence of cancer shown on the December 12, 2008 MRI. LF0092 (p.22), LF0110 (p.94). And there is evidence that Respondent's failure caused or contributed to cause Mr. Mickels's death on June 12, 2009. As such, this issue cannot be resolved by Summary Judgment, but must be decided by a jury. *Kivland*, 331 S.W.3d at 309-10.

Respondent produced an oncologist, Dr. Stephen Allen, for deposition. Dr. Allen testified: "The only thing I would disagree with Dr. Freter is that I don't believe that had the patient been diagnosed in December of '08, that his prognosis would have changed. I don't think that it would have changed his life expectancy at all." SLF11.[2] But this disagreement only confirms that an issue of fact remains for the jury and that Summary Judgment was inappropriate.

III. That a person would have died at a later point in time does not preclude causation.

Under Missouri law, a tortfeasor's negligence can contribute to cause death, even though decedent would have died at a later point in time in the absence of the negligence. An instructive case is *Collins v. Hertenstein*, 90 S.W.3d 87 (Mo.App. W.D. 2002). There, a mother sued three police officers for the death of her son, who was shot at least once by each officer. One of the bullets fired by defendant Hertenstein was alone sufficient to cause the death. One of the bullets fired by defendant Keeney was also alone sufficient to cause the death. But the only bullet fired by defendant Thomas which struck decedent was alone insufficient to cause the death. *Id*., at 93-94. The jury returned a verdict against each officer, but the trial court granted a JNOV as to defendant Thomas, "finding that Thomas did not cause or contribute to cause [decedent's] death. *Id*., at 92. The appellate court reversed, holding that:

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[2] Supplemental Legal File.

> The jury had a sound basis for concluding that the bleeding [caused by defendant Thomas' shot] contributed to the restricted flow of blood and, therefore, hastened [decedent's] death. **'[A]n act which accelerates death ... causes death[.]**' This is true even if the act hastens death by merely a moment. Although Thomas' gunshot alone should not have caused [decedent's] death, the jury could have found that Thomas' acts coalesced with those of Hertenstein and Keeney to hasten [decedent's] death; hence, the jury reasonably concluded that the bullet Thomas fired contributed to cause a single, indivisible injury for which Thomas could be held liable.

Id., at 96 (internal citations omitted) (emphasis added).

This is not mere dicta, but rather is integral to the court's holding. If the officer's act which accelerated the death could not, as a matter of law, be a contributing cause of the death, then the JNOV would not have been reversed.

As *Collins* makes clear, causation is not excused simply because decedent would have died in the near future. Rather, causation exists if the tort contributes to cause the death to occur at a time other than it would have but for the tort.

This has been the law in Missouri for over one-hundred years. In *Strode*, decedent was struck by a streetcar and died several weeks later. *Strode v. St. Louis Transit Co*., 95 S.W. 851 (Mo. 1906). The following instruction was given to the jury:

> If the jury believe from the evidence that at the time of the accident detailed in the evidence, [decedent] was suffering from phthisis pulmonalis, or

> consumption, and that he died from such disease, and that whatever injuries he received in said accident only hastened his death and were not the cause of the same, the plaintiff is not entitled to recover, and your verdict must be for the defendant; and that this is true without regard to whether or not the defendant was negligent at the time of said accident.

Id., at 852. On appeal, this Court succinctly held that "[t]his instruction was clearly wrong and should not have been given." *Id.*

Similarly, in *De Maet*, decedent was struck by a vehicle. *De Maet v. Fidelity Storage, Packing & Moving Co.*, 132 S.W. 732, 733 (Mo. 1910). At issue was whether she died "from the injury received from the buggy, or from one of three chronic diseases of long standing." *Id.* In affirming the trial court's overruling of the demurrer, this Court held: "Be it granted that there were certain organic troubles which would have shortly terminated her life; yet if the negligence of the defendant hastened the result, it is yet liable." *Id.*, at 734.

It is true that in these cases – *Collins*, *Strode*, *De Maet* – the negligence of the defendant was an affirmative act, rather than an omission as alleged here. But that distinction does not warrant a different ruling. "Actionable negligence consists in the breach or nonperformance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby." *Settle v. Baldwin*, 196 S.W.2d 299, 302 (Mo. 1946) (emphasis added). See also MAI 21.01 (requiring the verdict directing instruction in medical malpractice cases to "set out act or omission

complained of …"). At their core, *Collins*, *Strode*, and *De Maet* stand for the proposition that, in a wrongful death case, causation exists where a breach of duty contributes to cause a person to die at a time when he would not have in the absence of the breach.

Missouri law on this issue is not unique. Over fifty years ago, the Massachusetts Supreme Court considered the issue in a medical malpractice case involving a failure to diagnose. There, it was alleged that a physician failed to diagnose pneumonia, causing decedent's death. *Coburn v. Moore*, 68 N.E.2d 5, 7-8 (Mass. 1946). Although the primary cause of death was determined to be a cause other than pneumonia, there was evidence that the pneumonia "combined and contributed" to cause the death. *Id.*, at 10. The court held that "[i]f, as could be found, such negligence caused the death of the intestate to occur before it otherwise would, then liability for the death may be fastened upon the one producing this result." *Id.*, at 10.

More recently, the United States District Court of Rhode Island examined this issue at length. *Petro v. Town of West Warwick ex rel. Moore*, 889 F.Supp.2d 292 (D.R.I. 2012). In *Petro*, decedent suffered cardiac arrest while in police custody en route to the police station. *Id.*, at 308. After delays by police officers, EMS personnel attempted to resuscitate decedent, but were unsuccessful. *Id.*, at 313-4. At issue was "whether the officers' failure to render emergency assistance in a timely fashion was a proximate cause of Jackson's death." *Id.*, at 316. The court found that the officers' "negligence was a cause-in-fact of his death, even if [decedent] may not have lived much longer after sustaining such a heart attack." *Id.*, at 341.

In reaching this conclusion, the *Petro* court found support in cases from various jurisdictions:

> Applying Massachusetts law, the First Circuit has explained that, in a medical malpractice suit, where an ill person was on course to die from disease prior to the purported negligence, a jury may award damages if a medical professional's negligent procedure accelerated the decedent's death. *See Heinrich v. Sweet*, 308 F.3d 48, 60 (1st Cir.2002).
>
> ...
>
> This rule also has been adopted in jurisdictions across the country. *See In re Estate of Eliasen*, 105 Idaho 234, 668 P.2d 110, 120 (1983) ("Thus, an act which accelerates death, causes death, according to both civil and criminal law."); *Collins v. Hertenstein*, 90 S.W.3d 87, 96 (Mo.Ct.App.2002) ("An act which accelerates death ... causes death. This is true even if the act hastens death by merely a moment.") (internal citation and quotation marks omitted); *McCahill v. N.Y. Transp. Co.*, 201 N.Y. 221, 94 N.E. 616, 617 (1911) ("The principle is also true, although less familiar, that one who has negligently forwarded a diseased condition, and thereby hastened and prematurely caused death, cannot escape responsibility, even though the disease probably would have resulted in death at a later time without his agency. It is easily seen that the probability of later death from existing causes for which a defendant was not responsible would probably be an

> important element in fixing damages, but it is not a defense."); *Louisville & N.R. Co. v. Northington*, 91 Tenn. 56, 17 S.W. 880, 882 (1891) ("A man might be suffering from an incurable disease, or a mortal wound, with only two days to live, when a negligent wrong-doer inflicted upon him an injury which in his condition of debility took his life, or developed agencies which destroyed him in one day, and yet the latter wrong be in a legal sense the cause of his death, though it only hastened that which on the next day would have inevitably happened."); *Cunningham v. Dills*, 19 Wash.2d 845, 145 P.2d 273, 284 (1944) ("[A] person who by his wrongful or negligent act or omission accelerates a diseased condition, thereby hastening and prematurely causing the death of the diseased person may be held liable even though that disease would probably have resulted in death at a later time without any wrongful or negligent act having been committed.").

Id., at 340.

The *Heinrich* case, cited in *Petro*, presented similar issues to this case. There, decedent "suffered from a terminal form of brain cancer" for which defendants used "an experimental treatment." *Heinrich*, 308 F.3d at 53. Plaintiffs argued that, although decedent would have died at some point, the death was proximately caused by the experimental treatment. The court observed: "where the [decedents] were terminally ill and death was imminent, plaintiffs must show that the defendant's actions hastened death even though it would have occurred at no very remote date from other causes." *Id.*, at 60.

Plaintiff in that case, however, presented "no evidence at all" that the experimental treatment caused decedent to die when he did. Indeed, asked if the experimental treatment hastened decedent's death, plaintiffs' expert could not answer affirmatively. *Id.*, at 61.

Here, Appellants have presented the evidence lacking in *Heinrich*. The testimony of Dr. Freter, which must be viewed favorably to Appellant, is that had Respondent discharged his duty by diagnosing the cancer in December of 2008, Mr. Mickels would not have died on June 12, 2009, but would have lived "a number of months longer." LF0123 (p. 31).

It is important to recognize that Dr. Freter's testimony addresses two distinct issues. "Would Mr. Mickels have died on June 12, 2009 had there been a timely diagnosis of cancer?" addresses causation. "How long would Mr. Mickels have lived had there been a timely diagnosis of cancer?" addresses damages.

Regarding the issue of causation, Dr. Freter is clear: if the tumor had been diagnosed in December of 2008, "it's my opinion that the patient would live a number of months longer." LF0123 (p.31). This testimony sufficiently supports the causation element of a wrongful death claim.

As for the damages issue, when Respondent's counsel stated, "Then he maybe would've had six months longer," Dr. Freter responded, "Yes, on average. Now, he might've had a year. He might've had, you know, less than six months. It's hard to tell." LF0123 (p.33). At trial, Respondent might contest Dr. Freter's opinion of Mr. Mickels's

life expectancy in the absence of negligence as being based on statistics, but that is no different than the regular use of mortality tables as "guides or suggestions to the finder of fact." *Kilmer v. Browning*, 806 S.W.2d 75, 82 (Mo.App. S.D. 1991)(internal citations omitted). And any criticism of Dr. Freter's opinion on life expectancy in the absence of negligence merely goes to its weight. "So long as the expert is qualified, any weakness in the expert's knowledge is for the jury to consider in determining what weight to give the expert. The jury will decide whether to accept the expert's analysis of the facts and the data." *Kivland*, 331 S.W.3d at 311 (internal citations omitted)

Moreover, the evidence of causation is not lessened by the use of an average to measure life expectancy. Indeed, mortality tables are regularly admitted in wrongful death cases as "guides or suggestions to the finder of fact. Their probative value may be weakened by evidence of ill-health and these matters may be considered by the jury in weighing the testimony." *Kilmer v. Browning*, 806 S.W.2d 75, 82 (Mo.App. S.D. 1991)(internal citations omitted). Ultimately, the issue of damages, including Mr. Mickels's mortality in the absence of negligence, is for the jury.

Despite Appellants' evidence, Respondent argued before the trial court that "[n]o matter when the cancer was discovered, it was ultimately going to cause Mr. Mickels's death. In short, [Respondent] could not have prevented Mr. Mickels cancer and it was the cancer that caused Mr. Mickels death." LF0063. This position was adopted by the trial court in its Judgment: "There are no facts cited by [Appellants] that the tumor was treatable or that it was not fatal." A2. Respondent's argument, and the trial court's

ruling, do not comport with Missouri law. To make a case for wrongful death, Appellants are not required to show that Mr. Mickels's cancer was curable. It is only necessary to show that Respondent's negligence contributed to cause Mr. Mickels to die on June 12, 2009.

Below, Respondent relied on a pair of cases from the Western District which are in direct conflict with those from this Court discussed above. In *Super v. White*, 18 S.W.3d 511 (Mo.App. W.D. 2000), decedent's family asserted a wrongful death claim against several doctors alleging that they failed to diagnose and treat decedent's cirrhosis of the liver. *Id*., at 514. But, unlike in this case, plaintiff's expert could not testify that the failure to diagnose caused decedent to die at a certain time:

> Q. …So it would follow then, would it not, that you can't say with reasonable medical certainty that any specific act done by Dr. White caused Mr. Super to die in June, would you agree with that?
>
> A. I have to think about this. My answer to your question has to be that I cannot, because of lapses here in follow up, tell that – I can't tell you what the ongoing medical problem was the day that he came in. Okay? There was no laboratory data to support the argument either way.

Q. In other words, you can't make an opinion to a reasonable medical certainty tying Mr. Super's death to any account by Dr. White, is that correct? Is that what you are saying?

A. My answer is that it is both possible and not possible that his starting the [medication] led to his death.

Q. And I understand that. And I guess what I'm asking is we have – in lawsuits we deal with proof as opposed to possibilities. And I'm asking you isn't it correct to say that while you believe it may be possible, that you can't testify under oath with reasonable medical certainty that an act that Dr. White did before January of 1994 caused Mr. Super to die in June of 1995 ... January of '95 to June of '95?

A. I agree.

Id., at 517.

By comparison, Dr. Freter's testimony here is clear: "It's my medical opinion that it is more likely than not that if this had been discovered earlier, as has been alleged, then he would've lived an additional six months on the average." LF0130 (p. 61). While the court in *Super* stated that "[a]n action cannot be brought under the wrongful death statute, § 537.080, where the cause of death was merely accelerated," that reference appears only after the court detailed the deficient testimony of plaintiff's expert. *Id.*, at 519. Given the

lack of expert testimony, the court had no need to address whether acceleration of death supports a wrongful death claim and, therefore, the statement is surplusage.

Respondent also relies on *Morton v. Mutchnick*, 904 S.W.2d 14 (Mo.App. W.D. 1995). There, decedent presented to a hospital on several occasions with various illnesses, yet was not diagnosed with AIDS until his final admission, during which he died. *Id*., at 16. Decedent's parents filed a wrongful death claim, for which defendant's judgment on the pleadings was granted. *Id*., at 15. In affirming, the appellate court found that "the harm plaintiffs claim was suffered was not the loss of life, but rather, a shortening of life." *Id*., at 16.

But what is the loss of life if not the ultimate shortening of life?

Morton was decided in 1995. Putting that case into perspective, Earvin Magic Johnson had publicly disclosed his HIV status in 1991. Yet Mr. Johnson continues to thrive in spite of being diagnosed with a terminal disease nearly twenty-five years ago.

More persuasive than the majority opinion in *Morton* is the dissent of Judge Kennedy, which predicted the scenario here. Observing that *Wollen* does not deal with this type of case, he stated correctly that where the negligent failure to timely diagnose a terminal condition causes a person to die sooner than he or she otherwise would have, the delay in diagnosis is a cause of the patient's death. *Morton*, 904 S.W.2d at 18 (Kennedy, J, dissenting), *citing Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. 1992).

Morton was illogical when it was decided and it remains so twenty years later. And it is inconsistent with the longstanding cases from this Court. It – like *Super* – is

also inconsistent with *Collins*, a more recent opinion from the same appellate court. And it is inconsistent with holdings in numerous other jurisdictions, as discussed in *Petro*.

To the extent that *Morton* and *Super* suggest that contributing to cause the death of a terminally ill patient does not support a wrongful death action, they must be rejected. Those case ignore that the timing of a decedent's death is a factor in every wrongful death claim. Every person will, at some point, die. As the poet Abraham Cowley put it, "life is an incurable disease." To require proof that decedent "would not have died" demands the impossible. The law can require no more than proof that decedent "would not have died *at that time*."

IV. That Respondent's alleged negligence contributed to cause Mr. Mickels's death on June 12, 2009 is supported by evidence based on a reasonable medical certainty, not a statistical chance.

The causation evidence in this case is based on a reasonable medical certainty. Dr. Freter testified: "It's my medical opinion that it is more likely than not that if this had been discovered earlier, as has been alleged, then he would've lived an additional six months on the average." LF0130 (p.61). He confirmed that that opinion was given "to a reasonable degree of medical certainty." LF0130 (pp.60-1).

This is not a case like *Wollen*, which relied on statistical chance. There, defendant failed to diagnose decedent's gastric cancer. *Id.*, at 681-2. Plaintiff alleged that, if the cancer had been diagnosed, decedent "would have 'had a thirty percent (30%) chance of survival and cure.'" *Wollen*, 828 at 682. The decedent fell into a class of patients where:

> Doctors have a treatment that works in a large number of cases and fails in a large number of cases. Because there is a real chance that the patient will survive and a real chance that the patient will die from the disease – even if it is diagnosed – it is impossible for a medical expert to state with "reasonable medical certainty" the effect of the failure to diagnose on a specific patient, other than the fact that the failure to diagnose eliminated whatever chance the patient would have had.

Id., at 682. This Court offered an analogy: "A patient with cancer, like Mr. Wollen, would pay to have a choice between three unmarked doors—behind two of which were death, with life the third option. A physician who deprived a patient of this opportunity, even though only a one-third chance, would have caused her real harm." *Id.*, at 684.

This case is different. Here, the evidence is not that Mr. Mickels might not have died on June 12, 2009. The evidence, which must be viewed in the light favorable to Appellants, is that Respondent's failure to diagnose the cancer did, in fact, contribute to cause Mr. Mickels to die at that time. Using this Court's analogy, when Respondent read the MRI in December of 2008, there was only one unmarked door. Had Mr. Mickels been able to open that door, he would not have died on June 12, 2009. Respondent deprived him of that opportunity.

While this case is similar to the second hypothetical scenario described in *Wollen*, there is an important distinction. This case is not hypothetical. It cannot be reduced to three sentences, like the hypothetical scenario in *Wollen*. This case has evidence that

Respondent's failure to diagnose Mr. Mickels's cancer caused or contributed to cause him to die on June 12, 2009. *Wollen* was not confronted with this evidence and, therefore, was not called upon to address this type of case.

Again, this scenario was addressed in *Morton*. There, the Court observed that these facts do not give rise to loss of chance claim under *Wollen*. *Morton v. Mutchnick*, 904 S.W.2d at17 ("It appears that plaintiffs are arguing that they should be allowed to recover damages for Mr. Morton's lost chance to have his life extended by an unknown period of time until his ultimate death as a result of AIDS-related illness. Unfortunately, Missouri does not recognize such a cause of action.").[3] It is clear that the claim supported by the evidence in this case is for wrongful death, not loss of chance.

CONCLUSION

Appellants have produced evidence of each element of a medical malpractice, wrongful death claim. The evidence shows that Respondent failed to meet the standard of care, and was negligent, when he failed to observe and report the presence of cancer

[3] Even if facts like this could give rise to loss of chance claims, there would be significant practical limitations. In many such cases, by the time death occurs and damages determinable, the statute of limitations may well have expired. *See e.g., Weiss v. Rojanasathit*, 975 S.W.2d 113, 117-118 (Mo. 1998) (holding that the two-year statute of limitations in RSMo. §516.105 begins to run at time of the negligent act); *Markham v. Fajatin*, 325 S.W.3d 455, 459 (Mo.App. E.D. 2010) (holding that the two-year statute of limitations in RSMo. §516.105 applies to lost chance claims).

shown on the December 12, 2008 MRI. LF0092 (p.22), LF0110 (p.94). And the evidence shows that, "more likely than not," Respondent's failure caused or contributed to cause Mr. Mickels's death on June 12, 2009. LF0130 (p.61). This is evidence based on a reasonable medical certainty, not a statistical chance. These facts and their reasonable inferences must be viewed in favor of Appellants.

Moreover, causation is not lacking merely because Mr. Mickels would have died at a later point in time. That proposition is contrary to Missouri law and that of other jurisdictions. "[A]n act which accelerates death...causes death." *Collins*, at 96. By adopting Respondent's argument, the trial court's ruling absolves medical providers of liability for failure to diagnose in all cases where the undiagnosed condition will – at some point – claim the person's life. It matters not whether the person's life was cut short by six months, as here, or a decade. There is sufficient evidence – from the treating oncologist no less – that Mr. Mickels would have lived an additional six months if the cancer had been diagnosed in December of 2008.

This Court has described the need for cases like this to be resolved not by summary judgment but by juries. "The question of whether [decedent's] death by suicide was the direct result of the injury that he suffered is one that is most suitable for a jury: The evidentiary facts surrounding his death are not seriously in dispute – what is in dispute is a question whose answer can be well informed by the life experiences of 12 jurors." *Kivland*, 331 S.W.3d at 313. That reasoning can easily be adopted here. The evidentiary facts surrounding Mr. Mickels's death are not seriously in dispute. What is in

dispute – whether his death on June 12, 2009 was contributed to be caused by Respondent's failure to diagnose cancer – is a question whose answer can be well informed by the life experiences of 12 jurors.

At its core, Respondent's argument cannot truly be about causation; there is sufficient evidence to show that Respondent's negligence contributed to cause Mr. Mickels's death on June 12, 2009. Rather, Respondent's argument must necessarily be about duty. While Respondent might not be willing to admit it, he can only prevail if this Court holds that the medical community does not owe a duty to diagnose a terminal condition in their patients. So long as this case remains one of causation, summary judgment must be reversed.

"The manifest purpose of [the wrongful death] statute is clearly to provide, for a limited class of plaintiffs, compensation for the loss of the "companionship, comfort, instruction, guidance, counsel, ... and support" of one who would have been alive but for the defendants' wrong." *O'Grady v. Brown*, 654 S.W.2d 904, 908 (Mo. 1983) (reversing dismissal of wrongful death claim alleging unborn child's death resulted from defendants' failure to monitor, observe, or treat). Here, the evidence shows that but for respondent's negligence, decedent would have been alive for a number of months after June 12, 2009.

Respondent's Motion for Summary Judgment should have been denied. This Court should reverse the trial court's Judgment so that the issues can be decided by the jury.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Rule 84.06(c), this brief contains the information required by Rule 55.03, complies with the limitations in Rule 84.06(b), and contains 7,239 words, exclusive of the material identified in Rule 84.06(b), as determined using the word count program in Microsoft Word.

/s/ Thomas K. Neill

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties electronically through the Court's electronic filing system, on this 17th day of July, 2015, to:

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With a paper copied mailed, via first class U.S. mail, to:

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